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IN THE
COURT OF APPEALS OF INDIANA

LOUIS TOWNSEND,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A04-0610-CR-599
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0604-FA-180

AUGUST 1, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Louis Townsend ("Townsend") is appealing his conviction by a jury of the class D felony of criminal confinement and the class B felony of criminal deviate conduct. Townsend was sentenced to an executed sentence of three years on the class D felony, and to an executed sentence of twenty years on the class B felony, to be served concurrent with the class D felony sentence.

We affirm.

ISSUES

Townsend states the issues as:

1. Whether the trial court erred in limiting Townsend's cross-examination of the State's witnesses.

2. Whether the trial court properly sentenced Townsend.

FACTS

Townsend and Jennifer Bates ("Bates") had an off and on relationship for a period of about four years. Bates had secured a no-contact order preventing Townsend from seeing her. Bates ran into Townsend, and the next day Townsend entered her home without permission by letting himself in through the front door. Bates had sent her older daughter off to school and was watching television with her three-year-old daughter. Townsend told Bates that today was the day she was going to die.

Townsend was angry. He entered the bedroom where Bates and her daughter were watching television. The child became upset and Bates took her into another room to calm her. Townsend was calm for a while and then he would get upset again. Townsend

said he would kill Bates, let the daughter leave the house, and then kill himself. Whenever Townsend would raise his voice the daughter would come running into the room. Townsend told Bates to tell the child that they were just playing in order to calm the child.

Townsend went into the kitchen and returned with some belts, an electrical cord, and a knife with a long serrated blade. Townsend placed the knife on a table next to the bed. Townsend was described as being agitated, was cussing and insisting that he was going to prison or to the grave. When Townsend made a trip to the bathroom, Bates made a 911 call on her cell phone, but no one answered. When Townsend made another trip to the bathroom Bates made another 911 call while he was gone. When it was answered she whispered her address and told the operator she could not talk. Bates put the phone down, but left the connection open. When Townsend returned and saw the phone he took the phone apart and gagged Bates with a sweatshirt. Townsend got on top of Bates, who partially undressed, and subsequently performed oral sex on her. Bates cried during this occurrence. Townsend removed his belt and took off his pants. The child returned when Bates screamed.

The police arrived. Townsend saw them through one of the windows. Townsend told Bates to tell them everything was OK and they would leave. Bates put her panties and shorts back on. Bates had to move a coffee table from in front of the door in order to open it. There were two police officers outside when Bates opened the door. They had responded to a radio dispatch reporting the 911 call.

Officer Neal and Detective Brizendine asked Bates if everything was OK. Bates said "yes" but indicated through eye movements and gestures to indicate that things were not OK. Detective Brizendine saw that Bates was shaking and crying. He asked Bates and her child to step outside. Officer Neal went into the house where he saw Townsend sitting on the bed. Officer Neal asked Townsend what happened. Townsend said they were arguing over money. Bates told Detective Brizendine about the cord, the belt, and the knife. The Detective went into the house and confirmed the presence of the cord, belt, and knife.

Bates was taken to a hospital and then the sexual assault center. She had been crying during the investigation and examination.

Townsend was taken to the police department where he told the police that the sex he had with Bates was consensual and performed at her request.

Additional facts will be added as needed.

DISCUSSION AND DECISION

Issue 1.

Townsend's first issue is divided in two parts. The first is about restricting cross-examination of Bates, and the other part is the restricting of cross-examination of Detective Ockomon.

The admission or exclusion of evidence is a determination entrusted to the discretion of the trial court. *Smith v. State*, 839 N.E.2d 780, 784 (Ind. Ct. App. 2005). We will reverse a trial court's decision only for an abuse of discretion, that is, when the trial court's decision is clearly erroneous and against the logic and effect of the facts and

circumstances before the court. *Id.* The appellate review of the exclusion of evidence is not limited to the grounds stated at trial, but rather the ruling will be upheld if supported by any valid basis. *Lashbrook v. State*, 762 N.E.2d 756, 758 (Ind. 2002).

On cross-examination Townsend sought to question Bates about her drug use. The State objected, and the trial court ruled that Bates could be questioned about the use of cocaine on the morning of the incident, but could not answer questions about medications, how many prescriptions she had, and whether or not she was selling the medicine for cocaine.

In his offer to prove, Townsend alleged that Bates was trading pain killing pills for crack cocaine; that Bates was not telling the truth when she said that the sex act was not consensual; and, that Townsend had criticized Bates's drug habits and he refused to get her more drugs.

The trial court ruled that Evid. R. 616 must be read in conjunction with Evid. R. 403(b). Evid. R. 616 reads in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

Evid. R. 403(b) reads in pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence.

In essence, the trial court ruled that Bates' drug use had no relevance to whether there was consent to the sex act.

Townsend also argues that the trial court erred by preventing him from cross-examining Detective Ockomon. Detective Ockomon interviewed Townsend at the police station. During it's case in chief, the State asked Detective Ockomon if Townsend had admitted to being at Bates' house on the day in question, and if he admitted to having sexual relations with Bates on that day. Townsend admitted to both things to Detective Ockomon. Townsend made an offer to prove which included allegations that Townsend smelled cocaine when he entered Bates' house; that Bates offered and consented to oral sex by Townsend; that the police were knocking on the door before the sex act was completed; that Townsend criticized Bates for using cocaine in front of her daughter which made Bates angry and caused her to make a false complaint against Townsend; and, that Bates sold her prescription pills in order to buy crack cocaine.

Townsend now argues that the trial court prevented him from introducing the full statement that Townsend gave to Detective Ockomon. The trial court's ruling was that Evid. R. 106, when taken in conjunction with Evid. R. 403, would not allow evidence of Bates' prior bad acts contrary to Evid. R. 403. Evid. R. 106 reads in pertinent part:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

As in the prior portion of this issue the trial court ruled that evidence of Bates' drug use is barred by Evid. R. 403.

Issue 2.

Townsend testified at his sentencing. He argued about the insufficiency of trial counsel and nothing else. Bates testified as to the traumatic effects of the episode, both upon herself as well as her three-year-old daughter. Townsend's trial counsel made a brief argument that relied upon, it is argued, a minimal criminal record. The State made argument that Townsend's lengthy criminal record required the maximum sentence.

At the conclusion of the sentencing hearing the trial judge found no mitigating factors, and as aggravating circumstances the trial judge found that Townsend had a prior criminal history; that Townsend was on probation at the time this crime was committed; that Townsend was ordered to have no contact with Bates; and, the child was suffering emotional consequences because of what she observed. Townsend was given the maximum enhanced sentence for a Class B felony, twenty years.

Sentencing decisions are within the trial court's discretion and will be reversed only for an abuse of discretion. *Matshazi v. State*, 804 N.E.2d 1232, 1237 (Ind. Ct. App. 2004). The trial court must determine which aggravating and mitigating circumstances to consider when increasing or reducing a sentence and is responsible for determining the weight to accord these circumstances. *Id.*

We would first note that the applicability of *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) was available to Townsend when he was sentenced on July 17, 2006; however, it is waived because it was not raised to the trial court. *Crafton v. State*, 821 N.E.2d 907, 912 (Ind. Ct. App. 2005).

Townsend plucks the phrase that he is not one of the very worst offenders from the case of *Buchanan v. State*, 699 N.E.2d 655, 657 (Ind. 1998), as a justification for not

receiving an enhancement of his sentence. Townsend argues that his prior criminal record only shows a felony conviction in 1997 and conviction for two misdemeanors.[1] However, when evaluating the character of the offender, a trial court may consider the offenders arrest record in addition to actual convictions. *Johnson v. State*, 837 N.E.2d 209, 218 (Ind. Ct. App. 2005). The pre-sentence investigation shows about three pages of offenses that did not result in convictions, including check deception, battery, driving under the influence, robbery, domestic battery, and failure to appear. While Townsend may not be the worst offender in the sense of the *Buchanan* case, the record sustains the trial court's reliance upon his criminal history as an aggravating circumstance.

A defendant's criminal history alone is sufficient to support a defendant's enhanced sentence even if the court improperly had considered other aggravating factors, even where the court had concluded that no mitigating factors existed. *Burks v. State*, 838 N.E.2d 510, 525 (Ind. Ct. App.2005).

Townsend next argues that the fact that Townsend was on probation, and as a part of that probation was ordered to have no contact with Bates, should be treated as a part of his criminal history, instead of as a separate aggravating circumstance. Townsend cites no authority for this proposition, and, in fact, it ignores Ind. Code §35-38-1-7.1(a)(6) which says that violation of probation is an aggravating circumstance.

Townsend also says that it was error for the trial court to consider that the child suffered emotional distress and was in counseling for that disorder as an aggravating

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[1] One of the misdemeanors was for a battery against Bates.

circumstance. As a result Townsend on appeal argues that this aggravating circumstance was improper and violates his 6th Amendment rights. Since Townsend did not make his *Blakely* objection at sentencing his argument is waived.

There is no abuse of discretion in Townsend's sentence.

CONCLUSION

The trial court committed no error in limiting cross-examination of the State's witnesses nor was there an abuse of discretion in sentencing Townsend. Judgment affirmed.

NAJAM, J., and BARNES, J., concur.